No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. The rulemaking process enables the public to meaningfully participate in federal agency decision-making. 8

II. The FCC orders implementing the TCPA are essential to protect consumers against unwanted robocalls. 16

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.,
No. 15-CV-06314-YGR, 2018 WL 3707283 (N.D. Cal. Aug. 3, 2018) 21

ACA Int'l v. FCC,
885 F.3d 687 (D.C. Cir. 2018) 7, 9, 20

Ammons v. Ally Fin., Inc.,
326 F. Supp. 3d 578 (M.D. Tenn. 2018) 20

Flemming v. Associated Credit Servs., Inc.,
342 F. Supp. 3d 563 (D.N.J. 2018) 21

Gonzalez v. Ocwen Loan Servicing, LLC,
No. 5:18-cv-340, 2018 WL 4217065 (M.D. Fla. Oct. 30, 2018) 21

Grogan v. Aaron's Inc.,
No. 18-cv-2821, 2018 WL 6040195 (N.D. Ga. Oct. 26, 2018) 20

Maddox v. CBE Grp., Inc.,
No. 17-cv-1909, 2018 WL 2327037 (N.D. Ga. May 22, 2018) 21

Maes v. Charter Commc'n,
345 F. Supp. 3d 1064 (W.D. Wisc. 2018) 20

Marks v. Crunch San Diego, LLC,
904 F.3d 1041 (9th Cir. 2018) 21

Nat'l Cable & Telecomms. Ass'n v. FCC,
555 F.3d 996 (D.C. Cir. 2009) 9, 14, 15, 16

Pinkus v. Sirius XM Radio, Inc.,
319 F. Supp. 3d 924 (N.D. Ill. 2018) 21

Ramos v. Hopele of Fort Lauderdale, LLC,
334 F. Supp. 3d 1262 (S.D. Fla. 2018) 20

Reyes v. BCA Financial Services, Inc.,
312 F. Supp. 3d 1308 (S.D. Fla. 2018) 21

Sessions v. Barclays Bank Delaware,
317 F. Supp. 3d. 1208 (N.D. Ga. 2018) 21

Swaney v. Regions Bank,
No. 13-cv-544, 2018 WL 2316452 (N.D. Ala.
May 22, 2018) 21

U.S. West v. FCC,
182 F.3d 1224 (10th Cir. 1999), *cert. denied*,
530 U.S. 1213 (2000) 13

United States v. Nova Scotia Food Prod. Corp.,
568 F.2d 240 (2d Cir. 1977) 8

STATUTES AND REGULATIONS

Administrative Procedure Act, 5 U.S.C. § 551 *et seq* 5

§ 553 8

§ 553(b) 10

§ 553(c) 8

§ 553(e) 7, 8

§ 554 7

28 U.S.C. § 2112(a) 9

28 U.S.C. § 2342(1) 5, 7, 9

47 C.F.R. § 1.1 7

47 C.F.R. § 1.2 7

Telephone Consumer Protection Act of 1991,
Pub. L. No. 102-243, 105 Stat. 2394 (codified
at 47 U.S.C. § 227) 6

47 U.S.C. § 227(a)(1) 18

47 U.S.C. § 227(b)(1)(A)(iii) 18

47 U.S.C. § 227(b)(2) 5, 8, 18
47 U.S.C. § 227(b)(2)(C) 18, 21

OTHER AUTHORITIES

Admin. Office of the U.S. Courts, *Elec. Public Access Fee Schedule* (2017) 11

Brief of *Amici Curiae* EPIC and Six Consumer Privacy Organizations in Support of Respondents, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) 13

Brief of *Amici Curiae* Nat'l Consumer Law Ctr., Nat'l Ass'n of Consumer Advocates Consumers Union, AARP, Consumer Fed'n of America, and MFY Legal Serv.'s, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) 13

Brief of *Amici Curiae* Privacy and Consumer Organizations, Technical Experts and Legal Scholars in Support of Respondents Urging the Court to Deny the Petition for Review of the FCC's 2007 Order, *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) 15

Consumers Union, Comments on Letter of Nat'l Ass'n of Att'ys Gen. on Call Blocking Technologies, CG Docket No. 02-278 (filed Jan. 23, 2015) 12

EPIC et al., Comments on the Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Apr. 28, 2006) 14

EPIC, Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Aug. 30, 2005) 14

Fed. Commc'ns Comm'n, *ECFS Express Comment* (2019) 8, 10

Fed. Commc'ns Comm'n, *ECFS Submit a Filing* (2019) 10

Fed. Commc'ns Comm'n, *ECFS: Browse Popular Proceedings* (2019) 10

Fed. Commc'ns Comm'n, *ECFS: Search for Proceedings* (2019) 10

Fed. Commc'ns Comm'n, *Rulemaking Process* (2019) 10

Filings, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC Dkt. No. 16-106 (2016) 10

Fed. Trade Comm'n, *Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007* at 3 (Dec. 2017) 16

Fed. Trade Comm'n, *Consumer Sentinel Network Data Book 2017*, (Mar. 2018) 17

Fed. Trade Comm'n, *Text Message Spam*, (Mar. 2013) 17

Future of Privacy Forum, Comments on the Petition for Exemption of the Am. Bankers Ass'n, CG Docket No. 02-278 (filed Dec. 8, 2014) 12

Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 17 FCC Rcd. 14,860 (2002) 13

Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 FCC Rcd. 6927 (2007) 14

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2003 Order), 18 FCC Rcd. 14,014 (2003) 18, 19

In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2008 Order), 23 FCC Rcd. 559 (2008) 19

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391 (2012) 19

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961 (2015), *set aside in part, ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) 19

Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton (2018) 17

Nat'l Consumer Law Ctr. et al., Comments on the Petition for Declaratory Ruling of the Consumer Bankers Ass'n, CG Docket No. 02-278 (filed Nov. 17, 2014) 13

Noam Cohen, *There's No App for Justice*, New Republic (Apr. 25, 2018) 11

Open Secrets, *Top Spenders* (2019) 7

Press Release, Fed. Commc'ns Comm'n, FCC Adopts Rules to Allow Phone Companies to Proactively Block Illegal Robocalls (Nov. 16, 2017). 17

Ryan Singel, Stanford Ctr. for Internet & Soc'y, *Filtering Out the Bots: What Americans Actually Told the FCC about Net Neutrality Repeal* (2018) 11

U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017) 12

YouMail, *Historical Robocalls by Time.* 17

INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC has filed numerous briefs before this Court, over the past 25 years, in cases concerning the protection of privacy. *See, e.g.*, Brief of *Amicus Curiae* EPIC et al., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (arguing that technological changes since the era of analog phones justify departing from the third party doctrine); Brief of *Amici Curiae* EPIC et. al, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); Brief of *Amici Curiae* EPIC et. al, *NASA v. Nelson*, 562 U.S. 134 (2011) (No. 09-530) (arguing that the Court should recognize the right to informational privacy); Brief of *Amicus Curiae* EPIC, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (arguing that the Driver's Privacy Protection Act is constitutional and creates a baseline standard for driver privacy).

EPIC also routinely participates as *amicus curiae* in cases concerning the Telephone Consumer Protection Act and other important consumer privacy laws,

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

including in cases brought under the Hobbs Act. *See, e.g.*, Brief of *Amicus Curiae* EPIC, *Steven Gallion v. Charter Communications, Inc., et al.*, No. 5:17-cv-01361, 287 F. Supp. 3d 920 (C.D. Cal. 2018), *appeal docketed*, No. 18-55667 (9th Cir. May 23, 2018) (arguing that the TCPA protects important consumer privacy interests and has become more necessary as telephone technology has evolved); Brief of *Amici Curiae* EPIC et al., *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211) (arguing that the TCPA prohibits invasive business practices and that the companies, not consumers, bear the burden of complying with the statute); Brief of *Amici Curiae* EPIC et al., *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (arguing that the FCC's opt-in rule for disclosing customer proprietary network information was constitutional).

EPIC has provided expert analysis to Congress on emerging consumer privacy issues concerning the misuse of telephone customer information. *See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304: Hearing Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of Marc Rotenberg, Exec. Dir., EPIC);[2] *S. 1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 108th Cong., 2d Sess. (Sept. 21, 2004) (testimony of Marc Rotenberg, Exec. Dir., EPIC);[3] *Modernizing the Telephone Consumer Protection Act: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy and*

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[2] http://www.c-span.org/video/?18726-1/telephone-solicitation.

[3] https://epic.org/privacy/wireless/dirtest_904.html.

Commerce, 114th Cong. (2016) (letter for the record submitted by EPIC);[4] *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 115th Cong. (Apr. 18, 2018) (letter for the record submitted by EPIC).[5]

EPIC also routinely submits comments and petitions to federal agencies on the implementation of the Telephone Consumer Protection Act and other privacy statutes. *See, e.g.*, EPIC et al., Comments in the Matter of Telemarketing Rulemaking, FTC File No. R411001 (2002);[6] EPIC et al., Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (2002);[7] EPIC et al., Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-1346 et al. (2005);[8] EPIC, Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-2975 (2006);[9] EPIC et al., Comments on the Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Apr. 28, 2006); EPIC, Comments In the Matter of ACA

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[4] https://epic.org/privacy/telemarketing/EPIC-Modernizing-TCPA.pdf.

[5] https://epic.org/EPIC-SCOM-Robocalls-April2018.pdf.

[6] https://epic.org/privacy/telemarketing/tsrcomments.html.

[7] https://epic.org/privacy/telemarketing/tcpacomments.html.

[8] https://epic.org/privacy/telemarketing/tcpacomm7.29.05.html.

[9] https://epic.org/privacy/telemarketing/tcpacom11306.html.

International Petition for Expedited Clarification, Docket No. 02-278 (2006);[10] EPIC, Comments Concerning Implementation of the Junk Fax Prevention Act, CG Docket No. 05–338 (2006);[11] EPIC, Comments Concerning Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (2017);[12] EPIC, Comments Concerning the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, DA Docket No. 18-493 (2018);[13] EPIC, Comments Concerning the Refreshed Record on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (2018).[14]

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[10] https://epic.org/privacy/telemarketing/fcc_aca_05-11-06.html.

[11] https://epic.org/privacy/telemarketing/jfpacom11806.html.

[12] https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf.

[13] https://epic.org/apa/comments/EPIC-FCC-TCPA-June2018.pdf. EPIC also filed reply comments on the same docket: https://epic.org/apa/comments/EPIC-FCC-TCPA-ReplyComments-June2018.pdf.

[14] https://epic.org/apa/comments/EPIC-FCC-Robocalls-Refresh-Sept2018.pdf.

SUMMARY OF THE ARGUMENT

The Federal Communications Commission ("FCC") is responsible for administering the Telephone Consumer Protection Act ("TCPA") and other consumer protection laws that safeguard communications privacy. Like many consumer privacy laws, the TCPA has a private right of action to ensure vigorous enforcement. Congress also granted the FCC authority to implement the statute and to "prescribe regulations to implement the requirements" of the law. 47 U.S.C. § 227(b)(2). Any person can participate in the agency's rulemakings and adjudications through the APA notice and comment process. *See* 5 U.S.C. § 551 *et seq.* Congress also provided a mechanism to seek judicial review of FCC orders in the Hobbs Act. 28 U.S.C. § 2342(1). The end result is a set of regulations and interpretive orders that guide consumers, businesses, and other interested parties who might have claims or disputes arising under the TCPA. The question in this case is whether a business that has been sued for violating the TCPA can offer a defense based on an interpretation of the law that is contrary to a current, valid interpretation promulgated by the FCC. In EPIC's view, this outcome would be contrary to the well-established purposes of the Administrative Procedures Act.

A key advantage of administering these laws through the agency rulemaking and adjudication process is that members of the public have the opportunity to meaningfully comment on agency action and have a prompt and coordinated mechanism for judicial review. In the Hobbs Act, Congress decided to channel judicial review of FCC and other agency orders to the courts of appeals on an expedited 60-day timeline. As

a result, those individuals and groups who participate in the agency's notice and comment process can participate in final judicial review of the rules and regulations. This process not only facilitates public participation, it also enables the development of uniform standards to govern private enforcement through civil litigation.

The Court should deny the petition and affirm the lower court's ruling. First, permitting trial courts to interpret the TCPA in ways that contradict existing FCC interpretations will exclude the voices of consumers and related groups who are engaged at the agency level and will undermine the purpose of the notice-and-comment process. And second, authorizing collateral attacks on FCC orders will primarily redound to the benefit of those parties who have resources to attack FCC rules that are favorable to the public.

ARGUMENT

The Telephone Consumer Protection Act ("TCPA") created a general prohibition on business's use of automated or prerecorded telephone calls and unsolicited faxes, with narrow exceptions. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). In enacting the TCPA, Congress found that a general prohibition was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Id.*

Companies that choose to engage in the business practices restricted by the TCPA have an obligation to act within the law—and to seek clarification from the FCC if they believe the law is unclear. Companies have various tools available to them, including

petitioning the FCC for a declaratory ruling under 47 C.F.R. § 1.2 (in accordance with 5 U.S.C. § 554) and petitioning for the "issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e); *see also* 47 C.F.R. § 1.1. If any person wishes to challenge the validity of an FCC order or rulemaking, they can do so by filing a petition for review in a court of appeals under the Hobbs Act. 28 U.S.C. § 2342(1). Petitions for review can be filed either by the original parties to an FCC proceeding or by others who commented on a proceeding. *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018) (concerning multiple petitions for review of an FCC order consolidated in the D.C. Circuit).

Any company whose business practices are implicated by the TCPA thus has ample opportunity to advocate their interests throughout the administrative process. And these companies are not just represented individually; they are also represented by local and national trade groups including the U.S. Chamber of Commerce, the largest lobbying association in the United States. Open Secrets, *Top Spenders* (2019).[15] Some companies choose to use automated calling and messaging services—they are not obligated to do so. Congress determined that entities that use automated calling and messaging services—and not telephone subscribers—should bear the burden of limiting unwanted calls. Those obligations are set forth in the FCC's regulations and declaratory judgments interpreting and applying the TCPA, and Congress directed that such orders should be reviewed pursuant to the Hobbs Act.

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[15] http://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s.

I. The rulemaking process enables the public to meaningfully participate in federal agency decision-making.

Congress gave the FCC authority to implement the TCPA through rulemaking and adjudication. *See* 47 U.S.C. § 227(b)(2). And Congress expected that the views of the public would be incorporated in the decisions of federal agencies. Under the Administrative Procedures Act ("APA"), agencies are required to provide the public with notice of a proposed rule, followed by "an opportunity to participate" in the rulemaking, known as "notice-and-comment" rulemaking. 5 U.S.C. § 553. The APA also gives any person the right to petition for a new rule or modification to an existing rule. 5 U.S.C. § 553(e). In the resulting rule's "concise general statement," 5 U.S.C. § 553(c), the agency cannot "leave vital questions, raised by comments which are of cogent materiality, completely unanswered." *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). Rather, the agency has a duty to provide a reasoned explanation of its decision by addressing the "major issues" raised by the public's comments. *Id.* (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). The FCC has made it especially easy for the public to submit comments and petitions through the agency's electronic docketing system. *See* Fed. Commc'ns Comm'n, *ECFS Express Comment* (2019).[16] Public participation in recent agency proceedings shows that public participation is central to the implementation of consumer protection laws.

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[16] https://www.fcc.gov/ecfs/filings/express.

Congress enacted the Hobbs Act to channel judicial review of FCC orders through the courts of appeals. 28 U.S.C. § 2342(1). If more than one petition is filed, the actions are consolidated in one court. 28 U.S.C. § 2112(a). That means that any person who participated in the agency proceedings could reasonably track one case challenging a rule in order to ensure that their interests are represented during the judicial review process. Indeed, consumer groups frequently participate as *amici curiae* in Hobbs Act challenges to FCC orders. *See, e.g., ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (twelve consumer groups participating as amici curiae); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (eleven consumer protection groups participating as amici curiae). Public interest groups often petition the agency for modification of orders that do not adequately protect consumers. Business groups have similarly stepped in to participate in such proceedings. History demonstrates that the notice and comment process is essential to enable public participation in the administration of consumer protection laws.

In contrast, allowing defendants to challenge FCC orders in private enforcement actions would force the public, including consumer advocates, to identify, track, and attempt to intervene or participate in scattered proceedings across the country. The costs of participating would be prohibitive for most consumer groups and would diminish the public voice in the implementation of consumer protection laws.

The FCC's notice and comment process is designed to ensure public participation in agency proceedings. 1 Admin. L. & Prac. § 4:33 (3d ed. 2019). The FCC is required to publish its notices in the Federal

Register. 5 U.S.C. § 553(b). The FCC's free Electronic Comment Filing System also allows the public to search for proceedings, Fed. Commc'ns Comm'n, *ECFS: Search for Proceedings* (2019),[17] and browse popular ones, Fed. Commc'ns Comm'n, *ECFS: Browse Popular Proceedings* (2019).[18] In addition to a standard online form for filing comments and petitions, Fed. Commc'ns Comm'n, *ECFS Submit a Filing* (2019),[19] the FCC's ECFS system also gives consumers the option to submit an "Express" comment with a simplified, easy-to-use form. Fed. Commc'ns Comm'n, *ECFS Express Comment* (2019).[20] The FCC's website even features advice for how consumers can prepare effective comments. Fed. Commc'ns Comm'n, *Rulemaking Process* (2019).[21]

The extraordinary number of comments the FCC has received in recent rulemakings shows that the public wants their voice heard on important consumer protection issues. For example, over 220,000 comments were submitted electronically during the FCC's 2016 broadband privacy rulemaking. *See* Filings, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC Dkt. No. 16-106 (2016) (listing comments submitted between May 27, 2016 and July 6, 2016).[22] Public

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[17] https://www.fcc.gov/ecfs/search-proceedings.

[18] https://www.fcc.gov/ecfs/browse-popular-proceedings.

[19] https://www.fcc.gov/ecfs/filings/express.

[20] https://www.fcc.gov/ecfs/filings/express.

[21] https://www.fcc.gov/about-fcc/rulemaking-process.

[22] https://www.fcc.gov/ecfs/search/filings?date_received=%5Bgte%5D2016-5-27%5Blte%5D2016-7-6&proceedings_name=16-106&sort=date_disseminated,DESC&submissiontype_description=COMMENT.

interest also swelled during the FCC's 2017 net neutrality rulemaking—a report from Stanford University found that more than 800,000 unique comments were filed by the public, in addition to millions of form comments submitted automatically in an attempt to disrupt the public comment process. Ryan Singel, Stanford Ctr. for Internet & Soc'y, *Filtering Out the Bots: What Americans Actually Told the FCC about Net Neutrality Repeal* (2018).[23]

Meanwhile, the public faces substantial—and for most, insurmountable—barriers to participating in court proceedings as *amici curiae*. First, there is the obvious barrier that only licensed attorneys may file *amicus curiae* briefs in U.S. courts. Interested non-attorneys must hire counsel to file on their behalf, which is an expensive endeavor. Second, identifying and tracking cases of interest is expensive, time-consuming, and requires familiarity with federal dockets and the rules of appealability. To identify relevant cases, an interested person would have to either subscribe to a commercial legal research service or pay search fees to wade through hundreds of public court records. *See* Noam Cohen, *There's No App for Justice*, New Republic (Apr. 25, 2018) (calling Lexis and Westlaw "expensive services, imposing yet another layer of fees onto the already costly practice of law");[24] Admin. Office of the U.S. Courts, *Elec. Public Access Fee Schedule* (2017).[25] Even if an individual manages to find a

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[23] https://cyberlaw.stanford.edu/files/blogs/FilteringOutTheBotsUniqueNetNeutralityComments.pdf.

[24] https://newrepublic.com/article/147795/theres-no-app-justice-silicon-valley-startups.

[25] https://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule.

relevant case, they would need to be familiar with the local rules to determine whether and when *amicus* participation or third-party intervention is permitted. And all of these steps would need to be repeated for each new case that might result in modification of an FCC rule. In the context of TCPA litigation, the tasks of tracking all relevant cases is especially daunting: between August 1, 2015 and December 31, 2016, at least 3,212 TCPA cases were filed in 42 states. U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 2, 16 (Aug. 2017).[26]

In the past, public interest groups have successfully used the agency process to advocate for rules that protect consumers—and have participated in Hobbs Act judicial review when these rules have been challenged. A recent example is *ACA International*, concerning the FCC order interpreting the TCPA's autodialer restrictions. Consumer advocacy groups submitted comments in the FCC proceedings. *See, e.g.*, Consumers Union, Comments on Letter of Nat'l Ass'n of Att'ys Gen. on Call Blocking Technologies, CG Docket No. 02-278 (filed Jan. 23, 2015) (including signatures of 50,000 supporters);[27] Future of Privacy Forum, Comments on the Petition for Exemption of the Am. Bankers Ass'n, CG Docket No. 02-278 (filed Dec. 8, 2014);[28] Nat'l Consumer Law Ctr. et al., Comments on the Petition for Declaratory Ruling of the Consumer Bankers Ass'n, CG Docket No. 02-278 (filed Nov. 17,

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[26] *Available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

[27] https://ecfsapi.fcc.gov/file/60001016154.pdf.

[28] https://ecfsapi.fcc.gov/file/60001008332.pdf.

2014).[29] When companies petitioned for review of the order, EPIC and twelve other consumer groups submitted briefs as *amici curiae*. *See* Brief of *Amici Curiae* EPIC and Six Consumer Privacy Organizations in Support of Respondents, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); Brief of *Amici Curiae* Nat'l Consumer Law Ctr., Nat'l Ass'n of Consumer Advocates Consumers Union, AARP, Consumer Fed'n of America, and MFY Legal Serv.'s, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

Another example is the dispute over whether telecommunications companies had to obtain "opt-in" consent to disclose "customer proprietary network information" ("CPNI") to third parties that culminated in *National Cable & Telecommunications Association v. FCC*, 555 F.3d 996 (D.C. Cir. 2009). When the FCC first promulgated an opt-in rule following passage of the 1996 Telecommunications Act, U.S. West filed a successful Hobbs Act challenge. *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). The court of appeals held that the agency record did not adequately support the opt-in rule. *Id.* at 1228. The FCC subsequently issued a new order providing for opt-out consent when a carrier shared its data with affiliates, or with joint venture partners or independent contractors for marketing purposes, and an opt-in rule otherwise. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 17 FCC Rcd. 14,860 (2002).

Rather than try to collaterally attack the FCC's opt-out rule through individual civil enforcement

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[29] https://ecfsapi.fcc.gov/file/60000985926.pdf.

actions, public interest groups used the agency rulemaking process to strengthen consumer protections. In response to evidence that data brokers might obtain CPNI by posing as the customer or through other methods, EPIC petitioned the FCC to strengthen its consent rule by requiring carriers to institute security safeguards that would prevent unauthorized access to customer data. EPIC, Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Aug. 30, 2005).[30] The FCC initiated a rulemaking, and EPIC and other consumer protection groups submitted comments. *See, e.g.*, EPIC et al., Comments on the Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Apr. 28, 2006).[31]

As a consequence of the public rulemaking, the FCC gathered new evidence, established a more comprehensive record, and ultimately issued a new order requiring opt-in consent for carriers to share CPNI with joint venture partners and independent contractors for marketing purposes. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 FCC Rcd. 6927 (2007). The National Cable and Telecommunications Association ("NCTA") sought judicial review of the new CPNI rule under the Hobbs Act. *See NCTA*, 555 F.3d 996. EPIC and other consumer groups submitted an *amicus curiae* brief to defend the FCC order. Brief of *Amici Curiae* Privacy and Consumer

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[30] https://ecfsapi.fcc.gov/file/6518153274.pdf.

[31] https://ecfsapi.fcc.gov/file/6518334730.pdf.

Organizations, Technical Experts and Legal Scholars in Support of Respondents Urging the Court to Deny the Petition for Review of the FCC's 2007 Order, *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009). And the D.C. Circuit ultimately upheld the order. *NCTA*, 555 F.3d at 1002. The court also acknowledged EPIC's role in bringing about the FCC's action. As the D.C. Circuit explained:

> The Electronic Privacy Information Center petitioned in 2005 for further rulemaking to modify the Commission's customer information sharing rules. The petition noted the increasing number of "data brokers" -- organizations that sell private information about individuals online -- and expressed concern about how easily these organizations are able to obtain the information from carriers and other entities. Pet. for Rulemaking at 5S8. The petition suggested that data brokers might obtain the information from customer service representatives by pretending to have proper authority to receive it (known as "pretexting"), by gaining unauthorized access to consumers' online accounts with carriers (by hacking, for example), or through "dishonest insiders" working for the carriers. Id. at 1. Concerned that inadequate privacy protections contributed to the data broker problem, the Commission initiated a new rulemaking proceeding, received comments, and issued the Order at issue in this case. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 F.C.C.R. 6927 (2007).

Id. at 999.

These examples show that both public interest and business groups have the opportunity to participate in the agency process and to seek judicial review. If the development of the CPNI rule occurred outside the APA and Hobbs Act, in a world where defendants were able to challenge FCC orders in private litigation, public interest groups would have had to track private enforcement actions nation-wide where companies sought to challenge the FCC's opt-in rule, and submit *amicus curiae* briefs in each of those actions, to accomplish the same objective it did with just one *amicus curiae* brief. The ability of public interest groups to advocate on behalf of consumers at the FCC is especially important in the robocall context, as discussed below.

II. The FCC orders implementing the TCPA are essential to protect consumers against unwanted robocalls.

American consumers are subjected to an onslaught of unwanted robocalls, and the TCPA is one of the few acts of Congress intended to safeguard the public. Calls initiated by machines, oftentimes interrupting a meeting, a meal, or a solitary moment, have dramatically increased over the last ten years—almost six-fold from 756,000 complaints in 2009 to 4.5 million in 2017, Fed. Trade Comm'n, *Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007* at 3 (Dec. 2017).[32] Unwanted calls—including

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[32] https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial_do_not_call_report_fy_2016-2017_0.pdf.

robocalls—are also the top consumer complaint filed with the FCC. Press Release, Fed. Commc'n Comm'n, FCC Adopts Rules to Allow Phone Companies to Proactively Block Illegal Robocalls (Nov. 16, 2017).[33] YouMail, a provider of robocall blocking software, estimates that nearly 48 billion robocalls were placed in 2018—up from 30 billion in 2017. YouMail, *Historical Robocalls by Time*.[34]

Many of these automated messages also perpetuate fraud. Phone calls—including robocalls—were the method of contact in 70 percent of fraud reports made to the FTC in 2017, with a total of $290 million lost by consumers. Fed. Trade Comm'n, *Consumer Sentinel Network Data Book 2017*, at 12, (Mar. 2018).[35] The FTC calls text message spam a "triple threat" because "[i]t often uses the promise of free gifts or product offers to get you to reveal personal information; it can lead to unwanted charges on your cell phone bill, and it can slow cell phone performance." Fed. Trade Comm'n, *Text Message Spam*, (Mar. 2013).[36] Unwanted text messages "can be used to try to compromise your financial information or to install harmful

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[33] https://apps.fcc.gov/edocs_public/attachmatch/DOC-347787A1.pdf.

[34] https://robocallindex.com/history/time (last visited Feb. 11, 2019).

[35] https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf.

[36] https://www.consumer.ftc.gov/articles/0350-text-message-spam.

software on your mobile device." Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton (2018).[37]

The FCC orders implementing the TCPA are essential to combat unwanted calls. For example, many of the TCPA's robocall restrictions turn on the definition of "automated telephone dialing system" (also known as an "autodialer"). 47 U.S.C. § 227(a)(1). In particular, the TCPA makes it unlawful for any person to make a call (other than a call made for emergency purposes or made with the prior express consent of the called party) to a cell phone using an autodialer or an artificial or prerecorded voice. *Id.* § 227(b)(1)(A)(iii). Congress explicitly provided that the FCC "may, by rule or order" provide an exemption for certain calls "that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." *Id.* § 227(b)(2)(C). Congress also granted the FCC more general authority to "prescribe regulations to implement the requirements" of the TCPA. *Id.* § 227(b)(2).

Some of the agency's most significant regulatory orders are those that clarify the statutory autodialer definition in response to technological changes (including devices and systems designed to circumvent the TCPA's definition). In 2003 the FCC issued a set of implementing rules and regulations that clarified the scope of the autodialer definition. *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2003 Order), 18 FCC Rcd. 14,014 (2003). As the agency explained, "It is clear from the statutory language and the legislative history that Congress

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[37] https://us.norton.com/yoursecurityresource/detail.jsp?aid=CellPhone.

anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." *Id.* at 14,092 (citing 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.")). The agency made an important clarification in the 2003 Order: that the autodialer definition must include "predictive dialers" and other devices that have the "capacity to store or produce telephone numbers to be called" to "ensure that he prohibition on autodialed calls not be circumvented." *Id.* at 14,093.

The FCC followed up on that 2003 Order in a declaratory ruling in 2008, which reiterated the determination that predictive dialers fall within the statute's autodialer definition. *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2008 Order), 23 FCC Rcd. 559, 566 (2008). In that order, the Commission affirmed the earlier determination and rejected the argument that predictive dialers do not fall within the statutory definition if they dial from existing lists (as opposed to dialing numbers at random). The FCC reaffirmed again in 2012 that the autodialer definition "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391, 15392 at n.5 (2012).

When the FCC issued a further declaratory order in 2015, it expanded the definition of autodialer significantly to include equipment even if it does not

have the "present capability" to dial randomly or *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7971, 7977–78 (2015), *set aside in part, ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). After the FCC issued the 2015 Order, the same groups that had argued for a narrower autodialer definition in the 2008 rulemaking filed a Hobbs Act challenge in the D.C. Circuit. As a result of the petitioners' challenge, the court of appeals set aside the FCC order in part in *ACA International, et al. v. FCC*, 885 F.3d 687. In particular, the court found that the expanded definition adopted in the 2015 Order was "incompatible" with the statute because the law could not "reasonably be read to render every smartphone an ATDS subject to the Act's restrictions." *Id.* at 697. Here again, the industry groups had numerous opportunities to present their legal and policy arguments to the Commission, and were ultimately able to obtain partial victory through judicial review. It is hard to understand how these procedures do not provide more than sufficient due process.

But some litigants do not believe that the FCC rulemaking and adjudication process should be the primary mechanism for interpreting the TCPA. There are numerous opinions over the last year—since *ACA International* was decided—in cases where the defendants argued that courts should invalidate the 2003 Order in response to the D.C. Circuit's decision. *See, e.g., Grogan v. Aaron's Inc.*, No. 18-cv-2821, 2018 WL 6040195 (N.D. Ga. Oct. 26, 2018). Many lower courts have already pointed out that invalidating the 2003 Order based on a petition filed in 2015 would ignore the basic structure of the Hobbs Act. Simply put, "the *ACA* decision does not affect the definition of an ATDS as set forth in the FCC's 2003, 2008, or 2012 Orders."

Ramos v. Hopele of Fort Lauderdale, LLC, 334 F. Supp. 3d 1262, 1272 (S.D. Fla. 2018); *see also Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578 (M.D. Tenn. 2018); *Maes v. Charter Commc'n*, 345 F. Supp. 3d 1064, 1068 (W.D. Wisc. 2018); *Reyes v. BCA Financial Services, Inc.*, 312 F. Supp. 3d 1308, 1320 (S.D. Fla. 2018); *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-06314-YGR, 2018 WL 3707283, at *6 (N.D. Cal. Aug. 3, 2018); *Maddox v. CBE Grp., Inc.*, No. 17-cv-1909, 2018 WL 2327037 (N.D. Ga. May 22, 2018); *Swaney v. Regions Bank*, No. 13-cv-544, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018). Other courts have disagreed and held that earlier orders can be invalidated as a result of the *ACA International* decision. *See, e.g., Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018); *Sessions v. Barclays Bank Delaware*, 317 F. Supp. 3d. 1208, 1212 (N.D. Ga. 2018); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 924, 935 (N.D. Ill. 2018); *Flemming v. Associated Credit Servs., Inc.*, 342 F. Supp. 3d 563 (D.N.J. 2018); *Gonzalez v. Ocwen Loan Servicing, LLC*, No. 5:18-cv-340, 2018 WL 4217065 (M.D. Fla. Oct. 30, 2018).

The autodialer definition is the key to the TCPA protections for cell phone customers. Congress delegated interpretive regulatory authority to the FCC to implement the statute, and even emphasized that the agency must exercise that authority "as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). Congress also created in the Hobbs Act a channel for prompt judicial review of FCC orders, which enables uniform and certain application of the law. The Petitioners in this case are now asking the court to upend that entire system. Petitioners would replace the uniform system for implementing the TCPA based on the views of the

public, solicited through the transparent notice-and-comment process, with a chaotic and unpredictable system involving disparate interpretations adopted in hundreds of civil cases. This is not what Congress intended, is contrary to the purposes the APA and the Hobbs Act, and will diminish public participation in the decisions of federal agencies.

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For the foregoing reasons, this Court should affirm the Fourth Circuit and make clear that prior FCC interpretations are binding unless they are modified by the agency or successfully challenged under the Hobbs Act.

CONCLUSION

For the foregoing reasons, EPIC respectfully ask this Court to affirm the decision of the U.S. Court of Appeals for the Fourth Circuit and remand the case.

Respectfully submitted,

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